

FOSTERING INDEPENDENCE: A NEW PRO BONO OPPORTUNITY FOR FLORIDA LAWYERS

The Florida Statewide Guardian ad Litem Office has launched a new project called Fostering Independence. This exciting project pairs pro bono attorneys with teens in foster care, a group that has traditionally been underrepresented in the dependency system.

While the circuit Guardian ad Litem Programs attempt to provide volunteer Guardians ad Litem, most of whom are laypersons, to every child who finds himself or herself caught up in dependency court, there are not enough trained volunteers to be assigned to every case, a refrain many, if not all, of the judges reading this article have heard all too often from GAL Program staff. Normally, a volunteer must go through 30 hours of training over a two week period to become a certified Guardian ad Litem. The training usually occurs in the evenings and on Saturdays. This kind of time commitment may be especially onerous to busy practicing attorneys and may be a barrier to becoming a Guardian ad Litem. The training for the Fostering Independence program has been condensed to eight hours, consisting of videotaped presentations available on DVDs which can be viewed in the attorney's home or office, plus an overview of Chapter 39. A security background check is required prior to certification for all lay Guardians ad Litem, pursuant to section 39.821(1), Florida Statutes. An attorney who is a member in good standing of The Florida Bar does not have to undergo this screening, another measure that streamlines the certification process.

The Pro Bono Attorney & Lay Volunteer Training notebook which each attorney will be able to borrow from the circuit Guardian ad Litem Program consists of nine sections: Chapter 39 Overview, Understanding Children, Independent Living, Education, Understanding Levels of Care, Ethics, Psychological Evaluations, Infant Mental Health, and Permanency. Each section has a worksheet that must be completed by the attorney and which will be reviewed by the circuit GAL Program staff recruiter/trainer. The pro bono attorney Guardian ad Litem will receive CLE credits for viewing these materials (8 hours, which includes 1 hour of ethics credit).

In the past, attorneys who have functioned as Guardians ad Litem did not perform any type of legal work in their roles as GALs, except for the program in Orange County, where only attorneys have been appointed as Guardians ad Litem since the early 1970's and continued to do so after 1978 when Florida initiated a formal Guardian ad Litem Program and chose to utilize the lay person volunteer model. In 1993, the Second Judicial Circuit Guardian ad Litem Program started a Family Law section to provide Guardians ad Litem in dissolution of marriage cases and other family law cases in which custody of a child or children was an issue. Karen Oehme, who may be familiar to readers as the Program Director of the Clearinghouse on Supervised Visitation and the editor of this publication, began the Family Law section using only lawyers and law students from Florida State University College of Law, as the volunteer Guardians ad Litem. These attorneys did not practice law in their role as the Family Law Guardian ad Litem and were almost always accompanied to court by a staff attorney. Under the new Fostering Independence program, it is the intent that attorneys who are comfortable doing so may file motions and other pleadings and present these in court, including questioning witnesses at evidentiary hearings. The catch will be in a situation in which the pro bono attorney Guardian ad Litem would be giving

testimony. In that case, the GAL Program attorney would need to appear to present the case for the Guardian ad Litem Program. Some pro bono attorney Guardians ad Litem may not be comfortable in court arguing issues that arise under Chapter 39. Again, the GAL Program attorney should be available to be in court for that purpose. It is contemplated that the circuit Guardian ad Litem Program recruiter/trainer will interview each pro bono attorney prior to being certified to determine how much of the actual legal work the pro bono attorney Guardian ad Litem is interested in doing.

It is possible that on a particular case there could be an attorney ad litem for the child *and* a volunteer Guardian ad Litem who is also an attorney. The attorney ad litem has a traditional attorney/client relationship with the child and must represent the child's expressed wishes, if the child is of sufficient age and maturity to express his or her position. The Guardian ad Litem advocates for the child's best interests, as determined by the volunteer Guardian ad Litem, in consultation with the staff of the Program. A Guardian ad Litem should consider the child's expressed wishes in making a decision as to what is in the child's best interests. An area in which the distinction between an attorney ad litem and a pro bono attorney Guardian ad Litem is especially important is the confidentiality of the communication between the child and his or her attorney ad litem. A pro bono attorney Guardian ad Litem does not have that same relationship to the child and must, at times, report to the court the content of communication made by the child.

One of the responsibilities of any Guardian ad Litem is to make face-to-face contact with the child assigned to the Guardian ad Litem, at least on a monthly basis, and to get to know the child's wishes and needs. Similarly, a pro bono attorney Guardian ad Litem will be expected to have a personal relationship with the child, which is different from a normal attorney/client relationship. While it is preferred that the pro bono attorney Guardian ad Litem maintain contact on a monthly basis, the Pro Bono Attorney Protocol provided by the Statewide Guardian ad Litem Office requires that the initial meeting with the child be face-to-face, but after that the face-to-face contact with the child in his or her living environment can be done every 60 days, if circumstances allow, such as when a child has been stable in his or her placement for an extended period of time or when the pro bono attorney's relationship with the child has developed to the extent that the attorney can rely on the child to be candid over the telephone concerning what is going on in the child's life. In the alternate months, the contact can be made by telephone.

The pro bono attorney Guardian ad Litem will also perform other traditional duties of Guardians ad Litem, such as writing reports that must be filed with the court prior to various hearings, depending on what stage the case is in (for example, disposition hearing, judicial review hearing, or permanency hearing). The pro bono attorney Guardian ad Litem will have the support of the GAL Program staff in editing and filing reports, as well as distributing copies to all parties. At these hearings, the pro bono attorney Guardian ad Litem should be able to address the court with the concerns the GAL has about the child's situation and what actions need to be taken to protect the child and move him or her to a permanent living situation. Meetings of various kinds occur throughout the life of a dependency case, such as mediation, staffings at the Department of Children and Families (or the Community-based Care agency), and Individual Education Plan meetings at school, which the Guardian ad Litem is expected to attend. The pro bono attorney

Guardian ad Litem could be of tremendous help to the GAL Program attorney, because the case coordinator is often not comfortable attending these meetings in which the other parties are represented by an attorney and the GAL Program attorney can not attend every meeting on every case to which he or she is assigned.

Since this is a new program, there will inevitably be issues that arise that will need to be worked out as they arise. A potential problem may be the contact the pro bono attorney Guardian ad Litem has with the parents of the child. For a layperson Guardian ad Litem, it is typical for a program to send a copy of the Oath and Notice of Acceptance signed by the volunteer to all of the parties. Thereafter, the volunteer Guardian ad Litem makes contact with parents, teachers, doctors, and others with knowledge of the child to gather information for future reports and to figure out what needs to be done for the child. An attorney is prohibited from having contact with a represented party (Rule 4-4.2, Rules of Professional Conduct), so the pro bono attorney Guardian ad Litem will need to be very careful to notify the parents' attorneys before any contact is made with a parent and to secure that attorney's consent, preferably in writing, to talk with the parent.

The director of the Second Judicial Circuit Guardian ad Litem Program has received some questions about malpractice coverage from attorneys who read about Fostering Independence in the September 15, 2005 issue of The Florida Bar News. As a volunteer Guardian ad Litem, pro bono attorney Guardians ad Litem would be covered by section 39.822, Florida Statutes. This section states, "Any person participating in a civil or criminal proceeding resulting from such appointment [as a Guardian ad Litem] shall be presumed prima facie to be acting in good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed." It is clear that the actions typically performed by a volunteer Guardian ad Litem would be covered by this statute¹: investigation (...objective, systematic examination of the situation, including relevant history, environment, relationship, and needs of the child), facilitation (identifying resources and services for the child and facilitating a collaborative relationship among all parties involved in the case), advocacy (conveying the best interests of the child to the court and relevant agencies), and monitoring (keeping track of whether the orders of the court, as well as the plans of the Department of Children and Families, are carried out). It is not as clear that performing legal services as a Guardian ad Litem would be covered under section 39.822. Staff of the Statewide Guardian ad Litem Program have disseminated Florida Attorney General Advisory Legal Opinion 94-16 to address the issue of the provision of legal services by the pro bono attorney Guardian ad Litem. This AGO looks at the question of whether the Florida Volunteer Protection Act, section 768.1355, Florida Statutes, is applicable to attorneys providing pro bono legal services to a nonprofit organization (which includes any federal, state, or local government entity) and concludes that the act would appear to be applicable.

Angela Orkin, director of the Florida Statewide Guardian ad Litem Office, [Angela, would you like to add a statement here?]

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i. From the Guardian ad Litem Program website at www.guardianadlitem.org/